

**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

No. 20943 ✓

BRENT L. SELICK,

Appellant,

vs.

SUN HARBOR MARINA, INC.,  
A Nevada Corporation,

Appellee.

On Appeal From the United States District Court  
For the Northern District of California  
Southern Division

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BRIEF FOR APPELLEE

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STATEMENT OF THE CASE

This is an appeal from an order of the District Court dismissing appellant's libel for want of jurisdiction on the Admiralty side of the District Court. (Tr., vol. 1, p. 43)

Appellant was the vendor of an ex-Coast Guard picket boat under a conditional contract of sale to one Potter. Potter berthed the vessel at appellee's wharf incurring wharfage fees which were not paid. Appellee, being unsuccessful in its attempts at collection, asserted a possessory lien on the vessel and conducted a public auction of the boat for purposes of foreclosing its lien. (Tr., vol. 1, p. 22)

Appropriate notices of the auction were sent to appellant and the Potters. (Tr., vol. 1, p. 22)

Thereafter appellee brought an in personam action against appellant and the Potters to quiet title to the vessel which appellee had purchased at the auction. Appellant appeared by Answer in the quiet title action and filed a Cross-complaint against appellee herein alleging a conversion of the boat. (Tr., vol. 1, p. 19)

Following trial of the action, in which appellant participated, the San Diego Superior Court signed Findings of Fact and Conclusions of Law (Tr., vol. 1, p. 21) and entered its decree quieting title to the boat in appellee as against appellant and the Potters. (Tr., vol. 1, pp. 24-26)

After entry of the decree quieting title in appellee, appellant brought this action invoking the admiralty jurisdiction of the District Court seeking damages of appellee for reasonable rental of the boat, negligent damage to the vessel and for conversion of the vessel. (Tr., vol. 1, pp. 1-5)

Although it does not appear in this record, appellant has filed an appeal from the quiet title decree entered by the State Court. (See Opening Brief of Appellant, p. 9) Oral arguments on the State Court appeal are now set for April 12, 1967.

Appellee moved for dismissal of the District Court action (Tr., vol. 1, p. 8) and likewise moved for summary judgment. (Tr., vol. 1, p. 16)

The District Court ordered the action dismissed for want of jurisdiction following a hearing on appellee's motions. (Tr., vol. 1, p. 43)

Appellant filed this appeal. (Tr., vol. 1, p. 44) Appellee has heretofore filed its motion to affirm or dismiss this appeal, which motion has been passed for consideration to submission of the cause on its merits.

## QUESTION ON APPEAL

The fundamental question on this appeal is whether the State Court had jurisdiction to determine the quiet title action under the "Saving to Suitors Clause" of 28 USCA 1333 which provides:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. "

If the State Court had jurisdiction, then title has been quited in appellee, as against appellant (subject to the ruling of the State Courts on the appeal from that decree). Appellant's action for rental, property damage and conversion all must fall if he has no ownership interest in the boat. The action herein is thus a collateral attack upon the quiet title decree.

The Federal District Court may not interfere with the action of a State Court acting within that Court's jurisdiction under the "Saving to Suitors Clause". In the case of The Rosa, 53 F. 132 it was so held at page 134, the Court stating:

"By section 9 of the judiciary act of 1789, as well as by subdivision 8 of section 563 of the United States Revised Statutes, the admiralty and maritime jurisdiction conferred upon the district courts expressly 'saves to suitors in all cases the right of a common law remedy, where the common law is competent to give it'.

This provision must be observed in good faith. It seems to me manifestly to forbid any interference by this court with a suit in



the state court, when the whole subject matter and all the rights of both parties, upon the case as stated by the petition, can be perfectly adjudicated and preserved in the ordinary course of a common law suit. "

## ARGUMENT

The State Court had concurrent jurisdiction to determine the appellee's in personam quiet title action in aid of foreclosing its possessory lien for wharfage.

The basic fallacy of appellant's position in this appeal is the assumption that the State Court acted in rem to foreclose a maritime lien. It is thus argued that such a proceeding in rem is within the exclusive admiralty jurisdiction.

Here, however, the quiet title action was one in personam to foreclose a common law lien. In the case of Rounds v. Cloverport Foundry and Machine Co., 35 S. Ct. 596, 237 U.S. 303, 59 L. Ed. 966, the court explains the distinction between actions in rem and actions in personam as those terms have significance in maritime cases as follows (35 S. Ct. at pp. 597-598):

"Further, it is urged in support of the judgment that the proceeding was in personam, and not in rem; that the attachment and direction for sale were incidental to the suit against the owners and for the purpose of securing satisfaction of the personal judgment. Accordingly, it is said, the proceeding was within the scope of the 'Common Law Remedy' saved to suitors by the judiciary act. (citations)



As the last point is plainly well taken, it is unnecessary to go further. It is well settled that an action in personam the State Court has jurisdiction to issue an auxiliary attachment against the vessel; and, whether or not the contract in suit be deemed to be of a maritime nature, it cannot be said that the state court transcended its authority. The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing, - in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly'. . . . . Actions in personam with a concurrent attachment to afford security for the payment of a personal judgment are in a different category. (citations) And this is so not only in the case of an attachment against the property of the defendant generally, but also where it runs specifically against the vessel under a state statute providing for a lien, if it be found that the attachment was auxiliary to the remedy in personam. (citations)

. . . . .

In the present case, as we have said, the suit was in personam and the attachment was in that suit. It had no other effect than to provide security for the payment of the personal judgment which was recovered, and it was for the purpose of satisfying this judgment that, in the same proceeding and by the terms of the judgment, the vessel was directed to be sold. It

was within the scope of the common law remedy to sell the property of the judgment debtors to pay their debt. We are not able to find any encroachment upon the exclusive jurisdiction listed in the federal court in admiralty." (See also, 1 Benedict on Admiralty (Sixth Ed.), Section 24, pp. 40-41)

That a common law possessory lien for wharfage exists is supported by Adams v. John R. White and Son (R.I. 1918) 103 A. 230 at p. 232. The enforcement of such liens by the state courts has been upheld in California. (United States of Mexico v. Rask, 118 Cal. App. 21, 49; Arques v. National Superior Co., 67 Cal. App. 2d 763, 772-773)

### CONCLUSION

Appellee submits its motion to dismiss or affirm upon the moving papers on that motion and the authorities there cited.

It is further submitted that appellant has misconceived the state court proceeding as being one in rem as that term is used in determining exclusive admiralty jurisdiction.

Here, the state court proceeded in in personam to enforce a lien within its jurisdiction and quieted title to the vessel here involved in an action brought in personam as against appellant and the Potters, which action did not proceed against the vessel itself directly. The federal courts should not interfere with the state court proceeding. To do so would not only lead to a prolixity of litigation but could lead to inconsistent judicial determinations and attendant confusion and litigation.

Appellant has had his day in the state courts and is still pursuing his remedy therein.

The dismissal of the action should be affirmed.

Respectfully submitted,

HIGGS, JENNINGS, FLETCHER & MACK and  
WRIGHT & TOOTHACRE

By: /s/ EDWARD M. WRIGHT

Attorneys for Appellee.

#### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ EDWARD M. WRIGHT

